Supreme Court, U.S.
FILED
NOV 17 2000
CLERK

(3) (2) (3) (3)

Nos. 00-555, 00-587, 00-590 & 00-602

In The

Supreme Court of the United States

GENERAL COMMUNICATION, INC.,
PETITIONER,

v.

IOWA UTILITIES BOARD, *ET AL.*,
RESPONDENTS.

AND RELATED PETITIONS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CONSOLIDATED BRIEF FOR THE UNITED STATES TELECOM ASSOCIATION AND THE RURAL TELEPHONE COALITION IN OPPOSITION

GARY M. EPSTEIN
MAUREEN E. MAHONEY*
NANDAN M. JOSHI
LATHAM & WATKINS
1001 Pennsylvania Avenue,
N.W., Suite 1300
Washington, D.C. 20004
(202) 637-2200
Counsel for Respondents United States Telecom Association and Rural Telephone Coalition
* Counsel of Record
(Other counsel listed on inside cover)

29pp

Lawerence E. Sargent
Linda L. Kent
Keith Townsend
John W. Hunter
Julie E. Jones
1401 H Street, N.W., Suite 600
Washington, D.C. 20005
(202) 326-7371
Counsel for United States Telecom Association

L. Marie Guillory
Daniel Mitchell
4121 Wilson Blvd.,
10th Floor
Arlington, Virginia 22203
(703) 351-2000
Counsel for National Telephone Cooperative Association

Margot Smiley Humphrey
Holland & Knight, L.L.P.
2100 Pennsylvania Avenue, N.W.,
Suite 1000
Washington, D.C. 20037
(202) 955-3000
Counsel for National Rural Telecom Association

QUESTIONS PRESENTED

1. Where 47 U.S.C. § 251(f) provides that small and rural local exchange carriers are exempt from, and may obtain suspensions and modifications from, certain statutory obligations imposed on local exchange carriers if those obligations are "unduly economically burdensome," did the Eighth Circuit correctly hold that 47 C.F.R. § 51.405 impermissibly departed from the ordinary meaning of an undue economic burden?

2. Did the Eighth Circuit correctly hold that 47 U.S.C. § 251(f)(1) requires a party seeking to terminate a rural exemption to bear the burden of proving that the criteria for termination have been met, in conformity with the ordinary rule?

3. Did the Eighth Circuit correctly hold that 47 C.F.R. § 51.405 was arbitrary and unreasonable because the unambiguous language of the rule eliminated two of the three statutory grounds established in 47 U.S.C. § 251(f) for denying requests to terminate exemptions and granting suspensions or modifications?

CORPORATE DISCLOSURE

Pursuant to Rule 29.6 of the Supreme Court Rules, the United States Telecom Association ("USTA") and the Rural Telephone Coalition ("RTC") respectfully submit this disclosure statement.

USTA is a non-profit trade association representing the interests of facilities-based local exchange and exchange access providers. These companies are its full members. USTA also has international members who provide local exchange services in other jurisdictions, and associate members including consultants, manufacturers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

RTC is comprised of the National Rural Telecom Association, the National Telephone Cooperative Association, and the Organization for the Promotion and Advancement of Small Telecommunications Companies. Each of the associations in the RTC is a non-profit trade association representing the interests of facilities-based local exchange and exchange access providers. These companies are full members of the associations. Some of the associations also have international members who provide local exchange services in other jurisdictions, and associate members consisting of consultants, manufacturers, and other parties with interests in the local exchange carrier industry. Neither the RTC nor any of the associations have any parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT 1

I. REGULATION OF COMPETITION IN RURAL MARKETS 3

II. PROCEEDINGS BELOW 7

REASONS FOR DENYING THE WRIT 9

I. THE EIGHTH CIRCUIT'S DECISION TO VACATE RULE 51.405 DOES NOT PRESENT ANY ISSUE THAT WARRANTS SUPREME COURT REVIEW 9

II. THE EIGHTH CIRCUIT CORRECTLY APPLIED SETTLED PRINCIPLES OF STATUTORY INTERPRETATION 13

A. The Eighth Circuit Correctly Interpreted The Undue Economic Burden Standard Of Section 251(f) In Conformity With Its Ordinary Meaning 13

B. The Eighth Circuit Correctly Interpreted Section 251(f) To Impose The Burden Of Proof On The Applicant 15

C. The Eighth Circuit Correctly Held That The Unambiguous Language Of The FCC's Rule Impermissibly Prohibited State Commissions From Relying On Two Of The Statutory Grounds For Relief 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES **Page(s)**

AT&T Corp. v. Iowa Utils. Bd.,
525 U.S. 366 (1999) 7

Chevron U. S. A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 13

Director, Office of Workers' Compensation Programs v. Greenwich Collieries,
114 S. Ct. 2251 (1994) 16

Thomas Jefferson Univ. v. Shalala,
512 U.S. 512 (1994) 19

Sutton v. United Air Lines, Inc.,
527 U.S. 471 (1999) 16

STATUTES AND REGULATIONS

5 U.S.C. § 556(d) 16

5 U.S.C. § 706 2

47 U.S.C. § 153(37) 5

47 U.S.C. § 201 11

47 U.S.C. § 214(e) 4, 5, 14

47 U.S.C. § 251(a) 11

47 U.S.C. § 251(f) 6, 15

47 U.S.C. § 253(a) 4

47 U.S.C. § 253(f) 4

47 C.F.R. § 1.254 16

47 C.F.R. § 51.405(c) 6, 7, 8

47 C.F.R. § 51.405(d) 7

16 Tex. Admin. Code § 22.141 12

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 20166 (1996) 18

LEGISLATIVE MATERIALS

John C. Panzar & Steve S. Wildman, "Competition in the Local Exchange: Appropriate Policies to Maintain Universal Service in Rural Areas" (Northwestern Univ. 1993), attached to *National Communications Infrastructure (Part 3), Hearings before the Subcomm. on Telecomms and Finance of the House Comm. on Energy and Commerce*, 103d Cong. (Feb. 9, 1994) (testimony of Lawrence C. Ware, Rural Tel. Coalition) 3, 4

H.R. Rep. No. 81-246 (1949) 3

H.R. Rep. No. 104-204, pt. 1 (1995) 5

S. Rep. No. 104-23 (1995) 5

S. 652, 104th Cong., sec. 101, § 251(i) (1995) 6, 12

In The

Supreme Court of the United States

GENERAL COMMUNICATION, INC.,
PETITIONER,

V.

IOWA UTILITIES BOARD, *ET AL.*,
RESPONDENTS.

AND RELATED PETITIONS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

CONSOLIDATED BRIEF FOR THE UNITED STATES TELECOM ASSOCIATION AND THE RURAL TELEPHONE COALITION IN OPPOSITION

STATEMENT

Respondent United States Telephone Association ("USTA") is a non-profit trade association that represents the interests of over 1000 facilities-based local exchange and exchange access providers, most of which are small- and mid-sized local exchange carriers ("LECs"). Respondent Rural Telephone Coalition ("RTC") is an alliance composed of three national trade associations, the National Rural Telecom Association, the National Telephone Cooperative Association, and the Organization for the Promotion and Advancement of Small Telecommunications Companies, which together represent the interests of more than 850 small and rural incumbent LECs.

The Telecommunications Act of 1996 (the "1996 Act") sought to encourage competition in local markets by permitting competitors to interconnect with and use facilities of incumbent LECs on terms established in 47 U.S.C. § 251(b) and (c). Section 251(f) of the Communications Act of 1934 (the "1934 Act") concerns the application of these new competitive obligations to rural telephone companies and other small- and mid-sized LECs. Respondents participated in the FCC's rulemaking at issue here, and opposed the agency's adoption of 47 C.F.R. § 51.405 ("Rule 51.405") as an arbitrary and unreasonable interpretation of Section 251(f). Respondents then successfully challenged Rule 51.405 in the Eighth Circuit. The Eighth Circuit vacated the rule because it is based on an unreasonable interpretation of the statutory language in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

The petition for certiorari filed by the United States in this case does not request review of the Eighth Circuit's decision to vacate Rule 51.405, or present any issue that relates to the proper interpretation of Section 251(f). AT&T Corp. ("AT&T") and General Communication, Inc. ("GCI") have nevertheless filed petitions for certiorari seeking review of this issue. But there is no basis whatsoever to grant certiorari to review the validity of an agency rule when the United States has elected not to seek certiorari on that question. In addition, Petitioners concede that there is no judicial conflict on this issue, and the Eighth Circuit's interpretation of the statutory language does not foreclose competition in rural markets as Petitioners contend. The petitions do not present any question that warrants review by this Court.[1]

---

[1] This brief in opposition filed by USTA and RTC addresses only the Eighth Circuit's decision with respect to Section 251(f). USTA has joined the petition for certiorari filed by Verizon Communications, Inc. *et*

I. REGULATION OF COMPETITION IN RURAL MARKETS

1. Providing universal service to rural areas has presented difficult policy issues for many decades. The reason for the problem is straightforward: the cost of offering service in rural areas is substantially higher than the cost of providing service to urban areas.[2] The high cost structure of serving sparsely populated markets has generally discouraged investment in rural telephony. Over the years, however, small and rural telephone providers have made the substantial investment required to serve the most sparsely populated areas.

As "carriers of last resort," these small companies have been particularly vulnerable to "cream skimming" by new entrants that target only the few business users in the rural territories. *See, e.g.*, H.R. Rep. No. 81-246, at 8 (1949) (Congress imposed area-wide coverage requirements for rural markets because some telephone companies were "running their lines down the highways into the most profitable areas"). Left unchecked, the loss of even one or

---

al. in No. 00-511 seeking review of the Eighth Circuit's decision with respect to Section 252(d)(1). In addition, for the reasons set forth in the Brief in Opposition filed by BellSouth Corporation *et al.* in Nos. 00-555, 00-587, and 00-590, USTA opposes the grant of certiorari on the FCC's wholesale pricing formula under Section 251(c)(4) and the FCC's requirement that LECs combine previously uncombined network elements at the request of competitors.

2 An expert advised Congress that an analysis of rural telephone companies revealed that they had an average density of only six subscribers per route mile, while the Bell Operating Companies had an average density of 130 subscribers per route mile. *See* John C. Panzar & Steve S. Wildman, "Competition in the Local Exchange: Appropriate Policies to Maintain Universal Service in Rural Areas," at 6 (Northwestern Univ. 1993), attached to *National Communications Infrastructure (Part 3), Hearing Before the Subcomm. on Telecomms. and Finance of the House Comm. on Energy and Commerce*, 103d Cong. (Feb. 9, 1994) (testimony of Lawrence C. Ware, Rural Tel. Coalition) ("Panzar").

two high-volume customers in a rural market will drive up the costs of serving the rural LEC's remaining residential customers and/or diminish the economic viability of the rural service providers.

2. The Telecommunications Act of 1996 fundamentally changed the nature of competition in the telecommunications industry by removing many barriers to entry to competing providers of telephone service. Policies designed to promote vigorous competition in densely populated urban areas where vast economies of scale are possible, however, may harm the interests of customers in rural markets. *See* Panzar at 4-8. In recognition of the differences in rural and urban markets, the 1996 Act did not renounce decades of special policies designed to enable small and rural companies to provide service and update their networks. Congress instead struck a balance between two of its central goals: promoting competition and preserving the economic ability of small and rural telephone companies to continue to assume the burdens of universal service in rural markets with high cost structures.

Numerous provisions of the 1996 Act give the State Commissions regulating local telephone service the tools to prevent unchecked competition in rural markets. In Section 253, for example, Congress adopted a general rule that States may not prohibit any entity from providing "any interstate or intrastate telecommunications service," 47 U.S.C. § 253(a), but made a special exception to permit States to require any firm entering a market served by a rural telephone company to provide universal service throughout the market. 47 U.S.C. § 253(f). Similarly, Congress decided to promote universal service in high cost areas by granting financial support to telecommunications carriers that offered service "throughout the service area." 47 U.S.C. § 214(e). But Congress presumed that only *one* carrier should provide subsidized universal service to rural areas, and provided that a State could not permit a second

telecommunications carrier in "an area served by a rural telephone company" to obtain universal service payments unless the State Commission makes an express finding that it would serve the public interest to do so. 47 U.S.C. § 214(e)(2).

The central provision at issue here – Section 251(f) – also reflects Congress's recognition that rural markets are different, and that the competition policies of the 1996 Act must be carefully tailored to those markets. Although 47 U.S.C. § 251(c) requires LECs to provide competitors with interconnection and access to LEC facilities and services in order to stimulate and accelerate competitive entry, Section 251(f) establishes two statutory mechanisms to relieve rural telephone companies and other small carriers from those obligations.[3] Under Section 251(f)(1), "rural telephone compan[ies]"[4] are granted an automatic exemption from all of the interconnection obligations imposed on incumbent LECs by Section 251(c). The exemption can only be terminated in State Commission proceedings, and only if: (1) a carrier files a "bona fide request" for interconnection with the State Commission, *and* (2) the State Commission determines that "such request is not unduly economically burdensome," is "technically feasible," and is otherwise "consistent" with certain

---

[3] Congress recognized the need to include some type of exemption or waiver provision to create a "level playing field, particularly when a company or a carrier to which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources of the company or carrier." S. Rep. No. 104-23, at 22 (1995); *see also* H.R. Rep. No. 104-204, pt. 1, at 74 (1995) (rural exemption necessary to avoid "significant costs associated with seeking a modification or waiver before the Commission"). Such concerns culminated in Section 251(f).

[4] The definition of a "rural telephone company" is established in 47 U.S.C. § 153(37).

universal service provisions of Section 254. 47 U.S.C. § 251(f)(1)(A), (B).

Congress also adopted a distinct mechanism for granting other discretionary relief in Section 251(f)(2). Any LEC (including a rural telephone company) that has "fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide" may petition a State Commission for a suspension or modification of any requirement imposed by Section 251(b) or Section 251(c). 47 U.S.C. § 251(f)(2). A petition filed under this section may be granted by the State Commission if it finds that the suspension or modification is necessary to avoid a "significant adverse economic impact on users of telecommunications services generally," an undue economic burden, or a requirement that is "technically infeasible," to the extent consistent with "the public interest." 47 U.S.C. § 251(f)(2)(A), (B).

Exemption, suspension, and modification proceedings can only be conducted by State Commissions. Congress rejected a bill that would have granted the FCC concurrent jurisdiction to conduct these hearings. *See* S. 652, 104th Cong., sec. 101, § 251(i) (1995).

3. In its First Report and Order, the FCC promulgated only one rule concerning Section 251(f) exemptions and suspensions. Rule 51.405 establishes mandatory standards of proof that restrict the discretion of State Commissions conducting exemption, suspension, and modification hearings under Section 251(f). Three features of the rule are at issue in this case.

First, the text of Rule 51.405 unambiguously requires State Commissions to terminate a rural exemption unless the request for interconnection would impose an "undue economic burden."[5] In contrast, the statute establishes two

---

5 "In order *to justify continued exemption* under section 251(f)(1) of the Act once a bona fide request has been made, *an incumbent LEC must offer evidence* that the application of the requirements of section

additional grounds for denying a request to terminate a rural exemption: technical infeasibility and inconsistency with universal service provisions. The text of Rule 51.405 similarly eliminated two of the three independent criteria for granting a suspension or modification by requiring small and rural LECs to demonstrate undue economic burdens in all cases. 47 C.F.R. § 51.405(d).

Second, the FCC restricted the authority of State Commissions to consider the full extent of the "economic burden" that would result from a competitor's request to terminate an exemption (or the denial of a request for suspension or modification). Rule 51.405 provides that a State Commission finding that an economic burden is "undue" must not be based upon any "economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(c).

Third, the FCC prohibited State Commissions from imposing the burden of proof on carriers requesting termination of an exemption. The FCC's order did not attempt to reconcile its rule with the statutory language, but claimed that "it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements." GCI Pet. App. at 75a.

II. PROCEEDINGS BELOW

On remand from this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), the Eighth Circuit concluded that Rule 51.405 violated the APA. The Eighth Circuit vacated the FCC's rule because the rule departed from the statutory text in three respects.

1. The Court held that Rule 51.405 could not survive scrutiny under the APA because the plain language of the regulation eliminated two of the three statutory bases for

---

251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(c) (emphasis added).

denying a competitor's request to terminate an exemption. GCI Pet. App. at 27a. The statute permits a State to terminate a rural exemption only where "a request for interconnection, services, or network elements 'is not unduly economically burdensome, is technically feasible, *and* is consistent with section 254.'" *Id.* at 26a (emphasis added). In contrast, the FCC's rule provides that the rural telephone company "must offer evidence" of an "undue economic burden" to "justify continued exemption" from the interconnection obligations of Section 251(c). 47 C.F.R. § 51.405(c).

The FCC claimed that it did not intend to eliminate the other statutory criteria despite the unambiguous language of the rule. The Eighth Circuit explained, however, that State Commissions – not the FCC – must apply the rule, and "[a] State Commission looking at rule 51.405(c) would conclude that, if a rural ILEC had failed to show an undue economic burden, the exemption must be terminated, regardless of the existence of the ILEC's companion defenses of technical infeasibility and/or inconsistency with § 254 of the Act." GCI Pet. App. at 27a. Under these circumstances, the Eighth Circuit held that the rule was "arbitrary and unreasonable," and should be vacated. *Id.*

2. The Eighth Circuit also held the FCC had impermissibly departed from Congress's "chosen language" when establishing standards of proof governing a State Commission's inquiry into whether a request for interconnection would be "unduly economically burdensome." *Id.* at 30a. The Eighth Circuit explained that the statutory language demonstrated that "[i]t is the full economic burden on the ILEC of meeting the request that must be assessed by the state commission," and the FCC's decision to "exclude" consideration of the "'economic burden that is typically associated with efficient competitive entry'" had "substantially alter[ed] the requirement Congress established" and "impermissibly weakened the broad

protection Congress granted to small and rural telephone companies." *Id.* at 29a (citation omitted).

The Court further determined that the FCC's departure from the statutory text could not be justified by the FCC's asserted goal of increasing competition. The Court explained that "Congress sought both to promote competition and to protect rural telephone companies." *Id.* at 28a. The Court also rejected the claim that "consideration of the whole economic burden occasioned by the request will result in state commissions 'automatically' continuing the exemption, or 'automatically' granting a petition for suspension or modification." *Id.* at 30a. The Court observed that State Commissions that decide whether to terminate an exemption or grant a suspension or modification will "undoubtedly" consider the payments that the small and rural LECs receive from fulfilling interconnection requests when determining whether the overall economic burden was "undue." *Id.*

3. The Eighth Circuit also rejected the FCC's attempt to shift the burden to the rural LEC to "prove that it is entitled to a continuing exemption." *Id.* The Court held that "[t]he plain meaning of the statute requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption." *Id.* at 31a-32a.

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT'S DECISION TO VACATE RULE 51.405 DOES NOT PRESENT ANY ISSUE THAT WARRANTS SUPREME COURT REVIEW

Petitioners do not claim that review of the Eighth Circuit's interpretation of Section 251(f) is necessary to resolve a conflict with any other court. AT&T Pet. at 16-21; GCI Pet. at 7. Nor do Petitioners claim that review is

appropriate because the Section 251(f) issues are in any way intertwined with other questions presented in the parties' petitions for certiorari. They are not.[6] Petitioners instead claim that immediate review by this Court is essential because the Eighth Circuit's interpretation of Section 251(f) will effectively foreclose competition in rural markets. But that contention is completely undermined by the FCC's decision not to seek certiorari on the Section 251(f) issues, and Petitioners' claim rests upon a fundamental mischaracterization of Section 251(f) and the Eighth Circuit's decision.

1. GCI contends that this Court's review is warranted because "a panel of three Eighth Circuit judges alone will have effectively foreclosed the ability of the FCC to effectuate policy choices" necessary for competition in rural areas. GCI Pet. at 7-8. The FCC obviously does not share that view. The United States elected to exclude the Eighth Circuit's decision on Rule 51.405 from the scope of its own petition for certiorari. That decision provides a high level of assurance that the Section 251(f) issues raised by Petitioner do not rise to the level of national importance that warrants this Court's review.

The Eighth Circuit's decision does not foreclose the FCC's authority to adopt rules to promote competition in rural areas in any event. The decision merely requires those rules to be consistent with the 1996 Act. On the discrete legal questions at issue in this case, the Court held that the FCC's rule was not consistent with Section 251(f). This hardly forecloses the FCC from adopting other rules and

---

6 *See Verizon Communications, Inc., et al. v. FCC, et al.*, No. 00-511; *FCC, et al. v. Iowa Utils. Bd., et al.*, No. 00-587; *WorldCom, Inc., et al. v. Verizon Communications, Inc., et al.*, No. 00-555; *see also* AT&T Pet. at i (raising questions other than the Eighth Circuit's decision on Rule 51.405).

policies relating to rural competition that are consistent with the statute.

2. Petitioners overstate the effect of rural exemptions, suspensions, or modifications on the rights of competitors. Contrary to Petitioners' claims, Section 251(f) does not serve to prohibit competitors from entering rural markets. The exemptions, suspensions, and modifications authorized by the Act merely relieve small and rural LECs of the obligations to provide competitors with the right to compete through the use of the incumbents' facilities on the terms established by Section 251(b) and (c). Thus, even where a rural telephone company is exempt under Section 251(f)(1), or a small or rural LEC has received a suspension or modification under Section 251(f)(2), Section 251(f) does not prevent new entrants from providing local telephone service through the use of their own facilities in competition with the incumbent or using the incumbents' services pursuant to sections 201 and 251(a), 47 U.S.C. §§ 201, 251(a).

Indeed, AT&T asserts that it intends to compete in many rural markets using its own facilities. AT&T Pet. at 20-21. This in itself belies its contention that the Eighth Circuit's decision forecloses local competition in rural markets. AT&T's true complaint is that it may not obtain the competitive advantage of "cost-based interconnection" under Section 251(c)(2) (*id.* at 21), but that is a far cry from its claim that the Eighth Circuit's interpretation forecloses LECs from competing with incumbents in rural markets.

3. Petitioners' claim that the Eighth Circuit's decision makes exemption, suspensions, and modifications "automatic" and "permanent" is also mistaken. *See id.* at 18. The Court's interpretation of Section 251(f) does not transform every "economic loss[] from competitive entry" into an "undue" burden. *Id.* at 18-19. The decision instead allows for the possibility, which Rule 51.405 foreclosed, that economic burdens arising out of efficient competitive entry may, in particular circumstances, be "unduly economically

burdensome."[7] The decision accordingly does not foreclose competitive entry, but restores the State Commission's statutory authority to consider all the relevant factors in determining whether the competitor's request would be "unduly economically burdensome."

Similarly, placing the burden of proof on the party seeking to terminate a rural exemption does not place an insurmountable obstacle on competitors in Section 251(f) proceedings as Petitioners suggest. *Id.* at 19-20; GCI Pet. at 17. Litigants in State Commission hearings have many sources of information, including discovery and mandatory reporting requirements, from which they may obtain relevant information. *See, e.g.*, 16 Tex. Admin. Code § 22.141 (providing for discovery in administrative proceedings).

4. There is also no merit to GCI's contention that the "cultural predilection" of "local regulators" will now ensure that competition is thwarted. GCI Pet. at 9. Congress did not share GCI's skepticism concerning the State Commissions' willingness to fulfill their statutory responsibilities. To the contrary, Congress rejected a bill that would have given the FCC concurrent jurisdiction to conduct Section 251(f) hearings and entrusted the adjudicatory responsibility for conducting these proceedings to the State Commissions. *See* S. 652, 104th Cong., sec. 101, § 251(i) (1995).

---

[7] Contrary to AT&T's suggestion, AT&T Pet. at 19, this does not mean that every uncompensated loss of customers will impose an undue burden on small or rural LECs. Whether a loss of customers as a result of efficient competitive entry results in an undue burden will depend on a number of factors. Indeed, the situation contemplated by AT&T's example, where the rural LEC receives minimal revenue with which to meet its universal service obligations while losing significant numbers of customers to competition, is a situation in which, contrary to AT&T's argument, the burdens on the LEC will be the greatest, not the most trivial. *Id.*

II. THE EIGHTH CIRCUIT CORRECTLY APPLIED SETTLED PRINCIPLES OF STATUTORY INTERPRETATION

Petitioners' request for review boils down to their claim that the Eighth Circuit misinterpreted Section 251(f). A claim of legal error, however, provides no basis for review, and the Eighth Circuit correctly applied settled principles of statutory interpretation in any event.

A. The Eighth Circuit Correctly Interpreted The Undue Economic Burden Standard Of Section 251(f) In Conformity With Its Ordinary Meaning

1. Contrary to Petitioners' contentions (AT&T Pet. at 17-18; GCI Pet. at 20), the Eighth Circuit did not depart from the standards of interpretation established in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As *Chevron* itself explains, a reviewing court must consider the statutory text and "traditional tools of statutory construction" when determining whether a regulation represents a permissible construction of the statute. *Chevron*, 467 U.S. at 842-43 & n.9. The Eighth Circuit undertook that examination and properly found that Rule 51.405 did not satisfy the *Chevron* standard.

The Eighth Circuit correctly held that Rule 51.405 excluded consideration of certain types of economic burdens – those "associated with efficient competitive entry" – without any support in the statutory text. As the Court explained, "[the] *chosen language* looks to the whole of the economic burden the request [for interconnection] imposes, not just a discrete part." GCI Pet. App. at 30a (emphasis added). As the Court emphasized, "[i]f Congress had wanted the state commissions to consider only that economic burden which is in excess of the burden ordinarily imposed on a small or rural ILEC by a competitor's requested efficient entry, it could easily have said so." *Id.* at 29a-30a.

2. Petitioners contend that the Eighth Circuit should have upheld the FCC's rule because Congress sought to bring competition to rural areas. AT&T Pet. at 18; GCI Pet. at 24. The Eighth Circuit did not hold otherwise. *See* GCI Pet. App. at 28a ("It is clear that Congress intended that all Americans, including those in sparsely settled areas served by small telephone companies, should share the benefit of the lower cost of competitive telephone service and the benefits of new telephone technologies"). The Eighth Circuit recognized, however, that "Congress sought both to promote competition and to protect rural telephone companies," and that adherence to the ordinary meaning of the words used in Section 251(f) achieved both of those goals. *Id.*

The Eighth Circuit's analysis of the competing statutory policies is consistent with other provisions of the 1996 Act that balance Congress's twin goals of promoting competition and preserving the viability of the universal service providers in rural markets. For example, while Congress generally preempted state requirements that would "prohibit or have the effect of prohibiting" any entity from providing a competitive telecommunications service, 47 U.S.C. § 253(a), it permitted States to require any firm entering a market served by a rural telephone company to provide universal service throughout the market, even if this requirement effectively prohibits new entrants. Similarly, Congress permitted States to limit universal service support in rural markets to one carrier, absent a finding that it would serve the public interest to have additional carriers receive support. 47 U.S.C. § 214(e)(2). These provisions undoubtedly discourage some competitive entry, but that is a reflection of the congressional scheme. The Eighth Circuit's interpretation of Section 251(f) fits squarely within this framework.

B. The Eighth Circuit Correctly Interpreted Section 251(f) To Impose The Burden Of Proof On The Applicant

1. The Eighth Circuit held that the "plain meaning of the statute requires the party making the request to prove that the request meets" the criteria for termination of the exemption. GCI Pet. App. at 31a-32a. That conclusion finds direct support in the language and structure of the Act. Congress established in Section 251(f)(1) that a rural telephone company has an "exemption" from the obligations imposed by Section 251(c) of the Act, and that a State Commission cannot terminate the exemption unless the "party making a bona fide request . . . for interconnection, services or network elements . . . submit[s] a notice of its request to the State Commission" and the State Commission determines that "the request *is not* unduly economically burdensome, *is* technically feasible, and *is* consistent with [certain universal service provisions in] section 254." 47 U.S.C. § 251(f)(1)(B) (emphasis added).

In direct contrast to this language, Subsection (f)(2) requires a LEC seeking a suspension or modification to initiate the State Commission proceedings and to demonstrate that a requirement "*is* unduly economically burdensome," or that the other criteria are satisfied. 47 U.S.C. § 251(f)(2) (emphasis added). The different language used in the two sections clearly reflected a different allocation of the burden of proof, but Rule 51.405 ignored those differences and imposed the burden of proof on the rural LEC in exemption proceedings.[8]

Petitioners contend that, absent language in the statutory text expressly referring to the burden of proof, the FCC has complete discretion in deciding which party

---

[8] Respondents have always acknowledged that the language of Section 251(f)(2) demonstrates that a LEC seeking suspension or modification bears the burden of proof.

bears the burden. AT&T Pet. at 19-20; GCI Pet. at 14. Contrary to Petitioners' arguments, the plain meaning of a statute may be discerned even where the statute itself does not answer the question with explicit language. *See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (Americans with Disabilities Act held to require consideration of corrective measures in determining class of persons protected, even though the Act itself did not expressly state that corrective measures must be considered). Here, the Eighth Circuit had ample evidence from the statutory text to conclude that the plain meaning of Section 251(f) imposed the burden of proof on the party seeking to terminate a rural exemption.

2. The Eighth Circuit's reading of the statute is also buttressed by the ordinary rules governing the allocation of the burden of proof. The Administrative Procedure Act unequivocally establishes that "[e]xcept as otherwise provided by statute, the proponent of . . . [an] order has the burden of proof." 5 U.S.C. § 556(d). If the APA were applicable to State Commission proceedings, there could be nc question but that the carrier requesting the termination of the exemption – the "proponent of . . . [an] order" – would bear the burden of proof. *Id.*; *see also* 47 C.F.R. § 1.254 (providing that the burden of proof in FCC hearings "shall be upon the applicant except as otherwise provided"); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994) (Department of Labor had no authority to adopt an adjudicative interpretation that shifted the burden of proof to the party opposing a request). Congress used no language whatsoever to suggest an intent to mandate a different rule for State Commission proceedings under Section 251(f)(1).

3. Petitioners nevertheless protest that rural telephone companies should bear the burden of proof because they possess information that would be relevant to the State

Commission's determination whether to terminate the exemption. AT&T Pet. at 20; GCI Pet. at 16-17. Petitioners' argument ignores that the party requesting termination of the exemption has exclusive possession of much of the relevant information. For example, an analysis of the economic burdens that would be caused by a request for interconnection necessarily depends upon the details of the requesting party's plans, including specific information about the types of interconnection that such party is seeking, whether the requesting carrier intends to provide service throughout the rural area, and how the requesting carrier intends to price its services vis-à-vis the rate-regulated incumbent.

While Petitioners rely on the FCC's statement that the rural LEC controls much of the necessary information, *see* GCI Pet. App. at 75a, the Eighth Circuit was correct to discount the FCC's analysis. The FCC did not even attempt to identify the types of information that would be necessary or to explain why State Commissions' discovery rules and publicly available information about the incumbent LEC would be inadequate to provide a carrier requesting termination of an exemption with the relevant information.

4. GCI erroneously asserts that rural telephone companies should bear the burden of proof because they are seeking an exemption from general statutory requirements. The cases cited by GCI generally stand for the unremarkable proposition that a party seeking to take advantage of a statutory exemption must prove that it qualifies for that exemption. *See* GCI Pet. at 18. Respondents do not dispute that rural telephone companies must prove that they qualify as rural telephone companies to receive the benefit of the rural exemption under Section 251(f)(1). Once this is shown, however, the burden is on a party requesting termination of the exemption granted by the 1996 Act to show that the criteria for termination have been met. Contrary to GCI's contention, the Eighth

Circuit's approach to assigning the burden of proof is fully consistent with "the approach generally taken in this Court of assigning burdens of proof." *Id.* at 18.

C. The Eighth Circuit Correctly Held That The Unambiguous Language Of The FCC's Rule Impermissibly Prohibited State Commissions From Relying On Two Of The Statutory Grounds For Relief

The Eighth Circuit held that Rule 51.405 was invalid because the rule, by its terms, eliminated two of the three statutory criteria required to terminate a rural exemption. GCI alone contends that this Court should review the Eighth Circuit's decision on this point, citing an FCC order adopted after Rule 51.405 was promulgated to support its view that the FCC did not intend to preclude State Commissions from relying on any of the statutory grounds set forth in Section 251(f). GCI Pet. at 27 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 20166, ¶ 15 (1996)). Based on this order, GCI contends that the Eighth Circuit's interpretation of the FCC's rule was erroneous.

The issue raised by GCI is wholly unsuited for review in this Court. If, as GCI contends, the FCC did not intend to eliminate any statutory criteria for terminating the rural exemption, the FCC may easily re-promulgate Rule 51.405 in a manner that makes clear on the face of the regulation that all of the statutory criteria must be satisfied before the rural exemption can be terminated. Rule 51.405 as drafted, however, does not state this: it unambiguously provides that a rural telephone company "must offer evidence" of an undue economic burden to justify continued exemption under Section 251(f)(1). While an agency has some discretion in interpreting its rules, the agency may not justify a regulation by advancing an interpretation that is flatly inconsistent with its text, especially in the unusual

situation here where State Commissions, not the FCC, will have to apply the rule. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). The Eighth Circuit correctly vacated Rule 51.405 as an "arbitrary" and "unreasonable" rule in violation of the APA under these circumstances.

CONCLUSION

The petitions for certiorari should be denied.

Respectfully submitted,

GARY M. EPSTEIN
MAUREEN E. MAHONEY*
NANDAN M. JOSHI
LATHAM & WATKINS
1001 Pennsylvania Avenue,
N.W., Suite 1300
Washington, D.C. 20004
(202) 637-2200
Counsel for Respondents United States Telecom Association and Rural Telephone Coalition
*Counsel of Record

(Other counsel listed on next page)

November 17, 2000

Lawerence E. Sargent
Linda L. Kent
Keith Townsend
John W. Hunter
Julie E. Jones
1401 H Street, N.W,.
Suite 600
Washington, D.C. 20005
(202) 326-7371
Counsel for United States Telecom Association

L. Marie Guillory
Daniel Mitchell
4121 Wilson Blvd.,
10th Floor
Arlington, Virginia 22203
(703) 351-2000
Counsel for National Telephone Cooperative Association

Margot Smiley Humphrey
Holland & Knight, L.L.P.
2100 Pennsylvania Avenue, N.W.,
Suite 1000
Washington, D.C. 20037
(202) 955-3000
Counsel for National Rural Telecom Association